SUPREME COURT, U. S.

No. 838

FILED

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

MONTANA POWER COMPANY, *Petitioner*,

v.

FEDERAL POWER COMMISSION, THE CONFEDERATED SALISH AND KOOTENAI TRIBES OF THE FLATHEAD RESERVATION, and THE SECRETARY OF THE INTERIOR, *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

CHARLES A. HOBBY
HERBERT DYM
E. EDWARD BRUCE
888 - 16th Street, N. W.
Washington, D. C. 20016
Attorneys for Petitioner

Of Counsel:

JOSEPH A. McELWAIN
WILLIAM H. CORBIN
The Montana Power Company
Butte, Montana 59701

TABLE OF CONTENTS

	Page
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statutes Involved	2
Statement	3
Reasons for Granting the Writ	7
Conclusion	15

TABLE OF CITATIONS

Cases:

Allen v. *Grand Cent. Aircraft Co.*, 347 U.S. 535 9

Bernhardt v. *Polygraphic Co.*, 350 U.S. 198 ..... 11, 13

Cinderella Career & Finishing Schools, Inc. v. *FTC*, 425 F.2d 583 (D.C. Cir. 1970) 12

De La Rama S.S. Co. v. *United States*, 344 U.S. 386 ..... 7, 8, 9, 9n., 10, 10n., 11

El Paso v. *Simmons*, 379 U.S. 497 13

Erie R.R. v. *Tompkins*, 304 U.S. 64 13

New York Shipbuilding Corp. v. *United States*, 385 F.2d 427 (Ct.Cl. 1967) ..... 11n.

Pennsylvania Power & Light Co. v. *FPC*, 139 F.2d 445 (3d Cir. 1943), *cert. denied*, 321 U.S. 798 ..... 10n.

Tumey v. *Ohio*, 273 U.S. 510 12

United States v. *First City Nat. Bank*, 386 U.S. 361 ..... 14n.

United States v. *Grace & Sons*, 384 U.S. 424 12

United States v. *Moorman*, 338 U.S. 457 12

United States v. *Utah Const. Co.*, 384 U.S. 394 12

Page

Constitution and Statutes:

Constitution, Art. III ..... 10n.

28 U.S.C. §1254(1) 2

Federal Power Act of 1935 (Act of August 26, 1935, c. 687, 49 Stat. 838, as amended, 16 U.S.C. §§ 791 *et seq.*) 2-3

Sec. 10(e), as amended .....3, 4, 7, 10n.
Sec. 14 ..... 10n.
Sec. 28 .....4, 6, 9n., 10., 14n.
Sec. 313(b) 5

Federal Water Power Act of 1920 (Act of June 10, 1920, c. 285, 41 Stat. 1063) 2

Sec. 10(e) 4, 5, 9
Sec. 14 ..... 10n.
Sec. 28 5

War Risk Insurance Act, 54 Stat. 689, 690 7

Legislative Materials:

H.R. Rep. No. 1318, Committee on Interstate and Foreign Commerce, U.S. House of Representatives, 74th Cong., 1st Sess. (1935) ..... 10n.

Sen. Rep. No. 621, Committee on Interstate Commerce, U.S. Senate, 74th Cong., 1st Sess. (1935) ..... 10n.

Sen. Doc. No. 153, 71st Cong., 2d Sess. (1930) 14

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No.

MONTANA POWER COMPANY, *Petitioner*,

v.

FEDERAL POWER COMMISSION, THE CONFEDERATED SALISH AND KOOTENAI TRIBES OF THE FLATHEAD RESERVATION, and THE SECRETARY OF THE INTERIOR, *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

OPINIONS BELOW

The opinion of the Federal Power Commission and a Commissioner's concurring opinion are set out in the Appendix accompanying this petition at pages 76a-108a, and are reported at 38 F.P.C. 766. The Commission's order denying rehearing and a dissent to that order appear at pages 108a-112a of the Appendix, and are reported at 39 F.P.C. 321. The opinion of the panel of the United States Court of Appeals for the District of Columbia Circuit, as well as a dissent thereto, are set out in the Appendix at pages 48a-75a, and are not re-

ported. The opinion of the court on rehearing *en banc* and concurring and dissenting opinions to the decision *en banc* are set out in the Appendix at pages 1a-46a, and are not yet reported.

JURISDICTION

The opinion and order on rehearing *en banc* of the United States Court of Appeals for the District of Columbia Circuit were entered on July 15, 1970. (A. 1a, 47a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether a general savings clause in federal legislation which in terms preserves all prior "rights" can be construed to exclude the right to arbitration of disputed questions on the ground that the right to arbitrate is merely "procedural"?

2. Whether, when a federal regulatory statute provides that subsequent amendments shall not "affect any license theretofore issued under the provisions of this [Act] or the rights of any licensee thereunder" and a license is issued under that statute providing that a particular issue shall be resolved by a bargaining process between a regulatory agency and the licensee or, failing a bargain, by the arbitration of a neutral third party, the agency can itself adjudicate that issue in reliance upon an amendment to the statute passed after the issuance of the license?

STATUTES INVOLVED

The relevant sections of the Federal Water Power Act of 1920 (Act of June 10, 1920, c. 285, 41 Stat. 1063), and of the Federal Power Act of 1935 (Act of August

26, 1935, c. 687, 49 Stat. 838, as amended, 16 U.S.C. §§ 791 *et seq.*), are set forth in an Attachment to this petition.

STATEMENT

This case began when the Confederated Salish and Kootenai Tribes of the Flathead Reservation, Montana (the Tribes), filed a petition with the Federal Power Commission (the Commission) seeking readjustment of the annual rental charges owed to the Tribes by the Montana Power Company (the Company) for use of the Tribes' lands under the terms of the Company's license for a federal power project partially located on the Tribes' lands. The Tribes asserted that the Commission could entertain their petition under the Federal Power Act of 1935, section 10(e), even though that section was amended several years after the issuance of the Company's license. The amended section 10(e) provides that "when licenses are issued involving the use of . . . tribal lands embraced within Indian reservations the Commission shall . . . fix a reasonable annual charge for the use thereof, and such charges may . . . be readjusted by the Commission at the end of twenty years after the project is available for service. . . ."

The Company objected to the jurisdiction of the Commission to entertain the Tribes' petition, asserting that the readjustment issue must be referred to arbitration. It relied upon a provision of its license from the Commission which was issued in 1930, five years prior to the enactment of section 10(e) in its present form, and which provides:

> "The annual charges payable under this license may be readjusted at the end of twenty (20) years after the beginning of operations under this li-

> cense and at periods of not less than ten (10) years thereafter by mutual agreement between the Commission and the Licensee, with the approval of the Secretary of the Interior. In case the Licensee, the Commission, and the Secretary of the Interior cannot agree upon the readjustment of such charges, it is hereby agreed that the fixing of readjusted charges shall be submitted to arbitration in the manner provided for in 'The United States Arbitration Act,' (U.S.C., Title 9), such readjusted annual charges to be reasonable charges fixed upon the basis provided in Section 5 of Regulation 14 of the Commission, to wit: upon the commercial value of the tribal lands involved, for the most profitable purpose for which suitable, including power development."

This license was made pursuant to section 10(e) of the Federal Water Power Act of 1920, the statute in force when the license was issued and the predecessor of section 10(e) of the 1935 Act. Section 10(e) of the 1920 Act provided that all Commission licenses which involved the use of Indian lands must include a provision for fixed annual rentals for the first 20 years of operation of the power project and that these fixed charges would thereafter be subject to readjustment "in a manner to be described in each license."

The Company argued that the provisions of its license for bargaining between the Company, the Commission, and the Secretary of the Interior (the Secretary) and, if necessary, for arbitration by a neutral third party prevented the Commission from now asserting jurisdiction in a manner that would allow it unilaterally to impose readjusted rentals upon the Company. In support of its argument that readjustment of the rentals must be accomplished pursuant to section

10(e) of the 1920 Act and the terms of its license, the Company relied principally upon section 28 of the 1920 Act, now included as section 28 of the 1935 Act:

> "The right to alter, amend, or repeal this chapter is expressly reserved; but no such alteration, amendment, or repeal shall affect any license theretofore issued under the provisions of this chapter, or the rights of any licensee thereunder."

The Commission's decision of October 4, 1967, rejected the argument that it lacked jurisdiction unilaterally to readjust the annual rentals owed the Tribes, and ordered that these rentals be increased from $238,375 to $950,000 per year. (A. 76a, 102a). The Commission also held that this readjustment would be made effective retroactively to May 20, 1959, the twentieth anniversary of the operation of the power project, and that backpayments would bear interest at 6%.

The Company filed a petition to review the Commission's order in the United States Court of Appeals for the District of Columbia Circuit under section 313(b) of the Federal Power Act. A panel of that court in an opinion by Judge Tamm, joined by then Judge Burger, with Judge Leventhal dissenting, determined that the Commission lacked jurisdiction to readjust the annual charges and ordered that the case be dismissed by the Commission so that the parties could bargain concerning the dispute and, if necessary, submit it to arbitration in accordance with the Company's license. (A. 48a).

The court, however, then granted rehearing *en banc* and, in a 4-to-3 decision (with Judge Burger no longer participating), affirmed the Commission's decision that

it had jurisdiction to readjust the annual rental.[1] The majority opinion, per Judge Leventhal, determined that section 28 of the Act protected the Company "in general" only from "substantive" changes in its license, not from "procedural" changes, and that the right to bargain and to arbitrate provided for in the license was merely a "procedural" right which was not preserved by the savings provisions of section 28. (A. 12a-13a). The court went on to concede that some "procedural" rights of licensees might be saved by section 28, but only if the licensee could show that the "procedural" right involved was one that "had either been bargained for as a right or had otherwise been established as a matter of such importance that its removal raised problems of fairness." (A. 13a). The court then found that "the record [did] not provide the affirmative showing necessary" (A. 26a) to meet its test for applying the savings provisions of section 28.

Judge Tamm, dissenting, noted that section 28 on its face protects *all* rights of licensees—indeed uses disjunctive phrasing to provide that subsequent legislation shall not "affect any license" or "the rights of any licensee." (A. 38a). He also found it impossible, considering the circumstances surrounding the issuance of the Company's license, to reconcile the majority's fashioning of a distinction between "procedural" and "substantive" rights with prior decisions of this Court. Judge McKinnon concurred with Judge Tamm's dissent, but added his belief that the history of the 1935

---

[1] The *en banc* decision did not deal with the issues raised by the Company going to the merits of the Commission's decision. Since the earlier decision by the panel as to the Commission's lack of jurisdiction had made it unnecessary to reach those issues, the case was sent back to the panel for a rehearing and a decision on the merits. (A. 47a). That rehearing has not yet been held.

amendment to section 10(e) revealed that, contrary to the opinion of the majority, Congress had expressed its intention that the amendment should not apply to existing licenses. (A. 44a-46a). Judge McGowan joined both dissents.

REASONS FOR GRANTING THE WRIT

The court below has rendered a decision which, by imposing an implied distinction between "substantive" and "procedural" rights upon a general savings clause, is in direct conflict with prior authorities of this Court. Since this decision was rendered *en banc* (albeit by a sharply divided court) by the United States Court of Appeals for the District of Columbia Circuit, it constitutes a significant precedent which, if uncorrected by this Court, will stand for the narrow construction of savings clauses in federal legislation. Thus, the decision below significantly impairs the rights of all persons whose interests are protected by the savings clauses now incorporated in scores of federal statutes.

I

In *De La Rama S.S. Co.* v. *United States*, 344 U.S. 386, this Court unanimously rejected any interpretation of general savings clauses that turns upon an implied distinction between procedural and substantive rights. In that case the petitioner steamship company filed a libel in a district court pursuant to jurisdiction granted by the War Risk Insurance Act, 54 Stat. 689, 690. Subsequently, Congress cancelled a number of war power statutes, including the War Risk Insurance Act, while at the same time enacting a general savings clause with respect to this legislation. The Government conceded that under the savings clause its liability to the petitioner did not end with the repeal of the War Risk In-

surance Act; its claim was that the repeal of that act removed the sole basis for district court jurisdiction of petitioner's suit and that, therefore, the action must be brought in the Court of Claims.

The Government's argument that the general savings clause preserved only the substantive right to recover on the insurance policy and not the procedural right to an enforcement action in a district court was dismissed by Mr. Justice Frankfurter writing for the Court as a "contention which . . . goes a long way toward disposing of itself," 344 U.S. at 388, since it was based upon a distinction between substance and procedure that "is no more substantial than the tenuous bits of legal reasoning of which it is compounded," *id.* at 389.

The Court's refutation of the Government's argument so clearly shows the error of the court below that it deserves quotation at some length:

> "The Government rightly points to the difference between the repeal of statutes solely jurisdictional in their scope and the repeal of statutes which create rights and also prescribe how the rights are to be vindicated. In the latter statutes, 'substantive' and 'procedural' are not disparate categories; they are fused components of the expression of a policy.
>
> * * * *
>
> "If the aim is to destroy a tribunal or to take cases away from it, there is no basis for finding savings exceptions unless they are made explicit. But where the object of Congress was to destroy rights in the future while saving those which have accrued, to strike down enforcing provisions that have special relation to the accrued right and as such are part and parcel of it, is to mutilate that right and hence to defeat rather than further the legislative purpose." 344 U.S. at 390.

Cf. *Allen* v. *Grand Cent. Aircraft Co.*, 347 U.S. 535, 554-55.

De La Rama S.S. is directly applicable here. The provisions of the Company's license made pursuant to section 10(e) of the 1920 Act, like the statute in *De La Rama S.S.*, defined both the standard by which the Company's future liability to the Tribes was to be measured and the method by which that standard was to be applied. The Company's license provided that readjustment of the land rentals would be in accordance with "the commercial value of the tribal lands involved, for the most profitable purpose for which suitable, including power development." The majority below conceded that section 28 of the Act proscribes the use of some different standard in adjudging future liability to the Tribes. (A. 12a-13a). Plainly then, the rationale of *De La Rama S.S.* requires that the bargaining and arbitration framework set up to implement this standard be preserved with it.[2] In short, the prescription of the standard of liability and the means for applying that standard represent "fused components" which under *De La Rama S.S.* are both preserved by

[2] The Court's concern in *De La Rama S.S.* to preserve the procedures developed with reference to the implementation of a substantive right is strikingly illustrated by the decision of the Commission in this case concerning the actual readjustment to be awarded to the Tribes. The Commission apparently based its conclusion in part upon the standard of "reasonableness" set forth in the 1935 Act as the measure of the Company's liability to the Tribes rather than on the standard set out in the license. (A. 90a). It is not surprising that a Commission charged with the daily task of fixing "reasonable" rates and the like would be influenced by such a standard even though not set forth in the Company's license; an arbitrator, whose charter is the agreement of the parties, would be much less likely to depart from the standard set forth in the agreement.

a general savings clause, such as section 28 of the Power Act.[3]

Plainly, saving the Company's rights here to bargain with the Commission and then to arbitrate, failing a bargain, has "dollars-and-cents importance," 344 U.S. at 389, just as did saving the steamship company's access to a district court in *De La Rama S.S.* In that case the sole difference between a suit to recover on an insurance policy in the Court of Claims and in the District Court was that interest on the recovery accrued from the time of filing suit in the District Court, whereas interest did not accrue in the Court of Claims until entry of that court's judgment. In this case, on the other hand, in dealing with a change from arbitration to administrative adjudication we deal with a "change

---

[3] The majority below relied upon dicta in Pennsylvania Power & Light Co. v. FPC, 139 F.2d 445 (3rd Cir. 1943), *cert. denied*, 321 U.S. 798, in fashioning its distinction between "procedural" and "substantive" rights in the application of section 28 of the Act. Even the dicta of that case is readily distinguishable under *De La Rama S.S.* The legislative history of the 1935 amendments clearly shows that section 14 of the Act, the statute involved in *Pennsylvania Power & Light*, was amended to substitute the Commission's determination of the "net investment" in a power project for that of a district court since Congress thought it "highly doubtful" whether the grant of jurisdiction to district courts under section 14 of the 1920 Act constituted a grant of "judicial power" within the meaning of Article III of the Constitution. Sen. Rep. No. 621, Committee on Interstate Commerce, U.S. Senate, 74th Cong., 1st Sess. p. 46 (1935); H.R. Rep. No. 1318, Committee on Interstate and Foreign Commerce, U.S. House of Representatives, 74th Cong., 1st Sess. p. 25 (1935). Thus, the 1935 amendments to section 14 of the 1920 Act embodied a clear Congressional "aim . . . to destroy a tribunal or to take cases away from it." 344 U.S. at 390. The majority below conceded in this case, however, that "Congress did not expressly address itself to the issue of the applicability of the amended § 10(e) . . . to the problem of a pre-existing license containing a procedure for readjustment solely by agreement or arbitration." (A. 11a-12a).

[that] . . . may make a radical difference in ultimate results." *Bernhardt* v. *Polygraphic Co.*, 350 U.S. 198, 203.

Moreover, *De La Rama S.S.* and *Bernhardt* involved merely the substitution of one neutral tribunal for another. In this case the substitution of the Commission for an arbitrator had a far greater impact. For under the agreement between the Company, the Commission and the Secretary embodied in the Company's license, all three parties were given a right to bargain concerning adjustments in the rental to be paid to the Tribes. The existence of a binding arbitration clause, which provided for the appointment of a neutral to impose a decision upon the parties, would inevitably tend to push them from their maximum demands in bargaining toward a negotiated agreement, since none of the parties could confidently expect that a neutral arbitrator would confirm its position in a subsequent arbitration proceeding.

But by substituting itself for the neutral arbitrator, the Commission utterly destroyed the bargaining arrangement provided for in the license and changed the status of the Company from a negotiator with the Commission to a mere supplicant before it. Thus, the alteration of the Company's rights effected by the decision below was not simply the substitution of one neutral tribunal for another; instead it substituted one of the parties to the agreement for the neutral arbitrator chosen by them as the judge of their disputes.[4]

---

[4] Compare New York Shipbuilding Corp. v. United States, 385 F.2d 427 (1967), where the Court of Claims held that the United States could not unilaterally shift dispute resolution from an official named in the disputes clause of a Government contract to another official in the same agency, even though the administrative position identified in the contract had been abolished at the time

That this substitution cannot be justified as a mere change in "procedure" is shown by the cases in which the imposition of an interested party as an adjudicator of disputes has been condemned. *Tumey* v. *Ohio,* 273 U.S. 510. Cf. *Cinderella Career & Finishing Schools, Inc.* v. *FTC,* 425 F.2d 583 (D.C. Cir. 1970). This Court has, of course, enforced the decisions of the parties when they have agreed in Government procurement contracts and the like to resolve disputes by the decision of a Government contracting officer, *United States* v. *Moorman,* 338 U.S. 457, but it has done so because of its respect "for the parties' rights to contract and to provide for their own remedies." *United States* v. *Grace & Sons,* 384 U.S. 424, 429. Thus, when faced with a claim for unilateral dispute resolution by the Government, the touchstone of the Court's inquiry has been the parties' intention at the time they signed their agreement. Where it has been clear that neither party "could have understood that the disputes clause extended to" the particular matter in issue, the Court has refused to compel private parties to submit to a Government official's adjudication of contractual disputes. *United States* v. *Utah Const. Co.,* 384 U.S. 394, 404. Here, on the other hand, the majority below ignored the intention of the parties in compelling the Company to submit its dispute to the Commission.

---

the dispute arose. The Court of Claims reasoned that the contractor had bargained for dispute resolution by a particular official with limited responsibilities and detailed knowledge concerning the matters contemplated by the contract and that it could not therefore be made to accept dispute resolution by a government official with broader responsibilities and less knowledge about that area. Plainly, the substitution of the Commission, a party to the agreement, for a neutral arbitrator had a much more substantial effect than the attempted substitution of one Government official for another.

II

The reliance by the majority below upon a distinction between "substantive" and "procedural" rights to force the Company to try the issue of rental readjustment to one of the parties to the agreement is inconsistent with other cases in which the proffered distinction between procedural and substantive rights has been rejected by the Court in deciding upon the enforceability of arbitration clauses and other contractual rights. Thus, in *Bernhardt* v. *Polygraphic Co., supra,* the Court rejected the contention that arbitration was merely procedural—"a form of trial"—for purposes of applying the rule of *Erie R.R.* v. *Tompkins,* 304 U.S. 64, and held that the question of the enforceability of an arbitration clause, like the question of the standards to be applied, was a matter to be governed by state law in a diversity action. In *El Paso* v. *Simmons,* 379 U.S. 497, 506-09, the Court similarly refused to rest the application of the Contract Clause of Article I, Section 10 of the Constitution upon any asserted distinction between "substantive" and "procedural" rights.

III

The lack of faith of the majority of the lower court in its implied distinction between procedural and substantive rights in the interpretation of general savings clauses is revealed by its creation of another distinction between procedural rights which were actually bargained for and those which were not. But the creation of this distinction, as well as the finding that the Company failed to meet the burden of showing that the arbitration provision of its license was in fact a procedural right that the Company bargained for, cannot sustain the decision below.

The strained reading of this exception into a savings clause was first rendered in the majority opinion of the court *en banc*. It was, therefore, more than a little contrived for the Court of Appeals, without citing a single precedent, to fashion a distinction between actually bargained for and non-bargained for procedural rights in the enforcement of savings clauses and then to rest its decision upon the Company's failure to "provide the affirmative showing necessary" (A. 26a) to satisfy the majority's test for applying that distinction.[5]

The unfairness of imposing such a burden upon the Company was articulated by the dissenting opinion of Judge Tamm below (A. 42a): "[P]arties frequently agree upon some of the most important terms of contracts without a lot of bickering or negotiation;" one of the parties to a 40-year old agreement should not be assigned the burden of reconstructing the history of negotiations to show that a provision in the agreement was "bargained for" in the sense that the majority below used that term. In short, the parties should be able to rely upon the terms of their agreement and should not be forced to resort to parole evidence in the absence of ambiguity in those terms.

Finally, the official record of the negotiations, Sen. Doc. No. 153, 71st Cong., 2d Sess. p. 63 (1930), shows that the arbitration clause was agreed to by the Company and placed in its license only after the Company

---

[5] Moreover, "the general rule where one claims the benefits of an exception to the prohibitions of a statute" is that the burden of proof is upon the party claiming the application of the exception. United States v. First City Nat. Bank, 386 U.S. 361, 366. Thus, if there is to be any reliance upon an implied exception to the general savings clause of section 28, the burden would be upon the Commission or the Tribes to show that the exception applies.

had rejected the Commission's earlier proposal that the adjustment in the rentals be based "upon the facts as found by the Commission." Should this Court take action resulting in a remand to the Commission, the Company would offer evidence there showing that the provision for arbitration was a significant factor in the Company's agreement to accept its license and undertake construction and that the Company gave thorough consideration to and expressly rejected the Commission's proposal—*i.e.*, that it hold hearings and redetermine the rentals—the very thing that the lower court has held the Commission may now do.

CONCLUSION

For all the above reasons a writ of certiorari should be granted to review the decision of the Court of Appeals.

Respectfully submitted,

CHARLES A. HORSKY
HERBERT DYM
E. EDWARD BRUCE
888 - 16th Street, N. W.
Washington, D. C. 20016
Attorneys for Petitioner

Of Counsel:

JOSEPH A. MCELWAIN
WILLIAM H. COLDIRON
The Montana Power Company
Butte, Montana 59701

ATTACHMENT

Federal Water Power Act of 1920, Act of June 10, 1920, ch. 285, 41 Stat. 1063:

SEC. 10. That all licenses issued under this Act shall be on the following conditions:

* * *

(e) That the licensee shall pay to the United States reasonable annual charges in an amount to be fixed by the commission for the purpose of reimbursing the United States for the costs of the administration of this Act; for recompensing it for the use, occupancy, and enjoyment of its lands or other property; and for the expropriation to the Government of excessive profits until the respective States shall make provision for preventing excessive profits or for the expropriation thereof to themselves, or until the period of amortization as herein provided is reached, and in fixing such charges the commission shall seek to avoid increasing the price to the consumers of power by such charges, and charges for the expropriation of excessive profits may be adjusted from time to time by the commission as conditions may require: *Provided,* That when licenses are issued involving the use of Government dams or other structures owned by the United States or tribal lands embraced within Indian reservations the commission shall fix a reasonable annual charge for the use thereof, and such charges may be readjusted at the end of twenty years after the beginning of operations and at periods of not less than ten years thereafter in a manner to be described in each license: *Provided,* That licenses for the development, transmission, or distribution of power by States or municipalities shall be issued and enjoyed without charge to the extent such power is sold to the public without profit or is used by such State or municipality for State or municipal purposes, except that as to projects constructed or to be constructed by States or municipalities primarily designed to provide or improve navigation licenses therefor shall be issued without charge; and that

licenses for the development, transmission, or distribution of power for domestic, mining, or other beneficial use in projects of not more than one hundred horsepower capacity may be issued without charge, except on tribal lands within Indian reservations; but in no case shall a license be issued free of charge for the development and utilization of power created by any Government dam and that the amount charged therefor in any license shall be such as determined by the commission.

* * *

SEC. 28. That the right to alter, amend, or repeal this Act is hereby expressly reserved; but no such alteration, amendment, or repeal shall affect any license theretofore issued under the provisions of this Act, or the rights of any licensee thereunder.

* * *

Federal Power Act of 1935, Act of August 26, 1935, ch. 687, 49 Stat. 838, as amended, 16 U.S.C. § 791 et seq.:

SEC. 10 [16 U.S.C. § 803]. All licenses issued under sections 792, 793, 795-818, and 820-823 of this title shall be on the following conditions:

* * *

(e) That the licensee shall pay to the United States reasonable annual charges in an amount to be fixed by the Commission for the purpose of reimbursing the United States for the costs of the administration of sections 792, 793, 795-818, and 820-823 of this title; for recompensing it for the use, occupancy, and enjoyment of its lands or other property; and for the expropriation to the Government of excessive profits until the respective States shall make provision for preventing excessive profits or for the expropriation thereof to themselves, or until the period of amortization as herein provided is reached, and in fixing such charges the Commission shall seek to avoid increasing the price to the consumers of power by such charges, and any such charges may be adjusted from time to time by

the Commission as conditions may require: *Provided,* That when licenses are issued involving the use of Government dams or other structures owned by the United States or tribal lands embraced within Indian reservations the Commission shall, subject to the approval of the Secretary of the Interior in the case of such dams or structures in reclamation projects and, in the case of such tribal lands, subject to the approval of the Indian tribe having jurisdiction of such lands as provided in section 476 of Title 25, fix a reasonable annual charge for the use thereof, and such charges may with like approval be readjusted by the Commission at the end of twenty years after the project is available for service and at periods of not less than ten years thereafter upon notice and opportunity for hearing: *Provided further,* That licenses for the development, transmission or distribution of power by States or municipalities shall be issued and enjoyed without charge to the extent such power is sold to the public without profit or is used by such State or municipality for State or municipal purposes, except that as to projects constructed or to be constructed by States or municipalities primarily designed to provide or improve navigation, licenses therefor shall be issued without charge; and that licenses for the development, transmission, or distribution of power for domestic, mining, or other beneficial use in projects of not more than two thousand horsepower installed capacity may be issued without charge, except on tribal lands within Indian reservations; but in no case shall a license be issued free of charge for the development and utilization of power created by any Government dam and that the amount charged therefor in any license shall be such as determined by the Commission. In the event an overpayment of any charge due under this section shall be made by a licensee, the Commission is authorized to allow a credit for such overpayment when charges are due for any subsequent period.

* * *

SEC. 28 [16 U.S.C. § 822]. The right to alter, amend, or repeal this chapter is expressly reserved; but no such alteration, amendment, or repeal shall affect any license theretofore issued under the provisions of this chapter, or the right of any license thereunder.

• • •

SEC. 313(b) [16 U.S.C. § 825(1)(b)]. Any party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the United States Court of Appeals for any circuit wherein the licensee or public utility to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be transmitted by the clerk of the court to any member of the Commission and thereupon the Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of Title 28. Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceeding before

the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings which, if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 346 and 347 of Title 28.